No. 84-154

In the Supreme Court of the United States

OCTOBER TERM, 1984

DORIS M. CALDER, PETITIONER

v.

MAX D. CRALL AND SGT. TERRY L. EARL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR RESPONDENT EARL IN OPPOSITION

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TABLE OF AUTHORITIES

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Petitioner, an employee of the Army and Air Force Exchange Service (AAFES), brought this personal injury action against respondents Terry L. Earl, a serviceman on active duty in the Air Force, and Max D. Crall, a civilian employee of the Air Force, in their individual capacities.[1] Petitioner seeks review of a decision of the court of appeals holding that petitioner's action is barred by the exclusivity provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 933(i).

1.a. On March 27, 1979, respondent Earl was ordered to post disaster shelter signs at various locations throughout Fairchild Air Force Base, in Spo-

[1] The Department of Justice represents respondent Earl; respondent Crall is separately represented.

kane, Washington (Pet. App. 12). Respondent Crall, a carpenter employed at the base, was assigned to assist respondent Earl (*ibid.*). Petitioner, who was employed by the AAFES as a cashier at the base cafeteria, was injured when a nail fired by respondent Crall from a fastener gun penetrated a wall and struck her in the leg (*ibid.*). Petitioner received compensation for her injury under the LHWCA, her workers' compensation scheme.[2] She then brought this personal injury action seeking additional recovery from respondents Earl and Crall in their individual capacities.[3]

b. The exclusivity provision of the LHWCA bars a personal injury action by a covered employee for additional recovery against "persons in the same employ" (33 U.S.C. 933(i)). Accordingly, respondents moved to dismiss petitioner's action on the ground that petitioner was precluded from suing fellow federal employees. Respondent Earl, an active duty serviceman, also argued that petitioner's personal injury action was inconsistent with the policies underlying the *Feres* doctrine. See *Feres* v. *United States*, 340 U.S. 135 (1950). The district court denied the motions and the jury found in favor of petitioner, awarding her $25,000 (Pet. App. 12).

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[2] The AAFES is a nonappropriated fund instrumentality (NAFI); that is, its operations are funded from Exchange earnings, not from congressional appropriations. NAFI employees receive workers' compensation benefits under the LHWCA rather than under the Federal Employees' Compensation Act (FECA). See 5 U.S.C. 8171(a) and (b); 5 U.S.C. 2105(c).

[3] Orville Lopp, Crall's supervisor, also was named as a defendant. He was granted a directed verdict at the close of trial (Pet. App. 12 n.1).

c. The court of appeals reversed (Pet. App. 16). The court held that because petitioner and respondents all were federal employees working at Fairchild Air Force Base under the jurisdiction of the Department of the Air Force, they were "persons in the same employ" for purposes of 33 U.S.C. 933(i) (Pet. App. 16). Having concluded that petitioner's action was barred by statute, the court of appeals did not reach the question whether this action against respondent Earl was inconsistent with the policies underlying the *Feres* doctrine (Pet. App. 12 n.2).

2. The decision of the court of appeals is correct and does not warrant further review. The petition simply reiterates the arguments that were thoroughly analyzed, and rejected, by the court of appeals. For the reasons aptly stated in the court's decision, petitioner's contention that her fellow federal employees were not her "co-employees" under the LHWCA is without merit.

a. Petitioner urges this Court to review "the Court of Appeals' failure to recognize that Army-Air Force Exchange Service employees were specifically excluded as federal employees for purposes of worker's compensation, and are entitled to sue negligent third persons" (Pet. 7). Contrary to petitioner's assertion, however, the court of appeals was fully aware that AAFES employees are covered under the LHWCA, rather than under FECA, and that the LHWCA allows an employee to sue a 'third party" (Pet. App. 13). But the fact that NAFI employees are exempt from FECA coverage does not mean that NAFI employees are not "employees of the United States" (*id.* at 15). Although AAFES employees are exempt from FECA, the AAFES is nevertheless an

integral part of the United States military structure;[4] and AAFES employees, when performing their official duties, are federal employees. *Id.* at 15-16 (citing *United States* v. *Hopkins*, 427 U.S. 123, 128 (1976)); *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 485 (1942); *United States* v. *Forfari*, 268 F.2d 29 (9th Cir.), cert. denied, 361 U.S. 902 (1959).[5] Thus, the court of appeals correctly concluded that respondents were petitioner's co-employees, because petitioner and respondents all were federal employees under the jurisdiction of the Department of the Air Force (Pet. App. 16).

b. Citing internal regulations of the Department of Labor (20 C.F.R. 701.301(a)(13)), petitioner argues (Pet. 9) that the federal government does not meet "the statutory definition" of employer. The regulations define an "employer" as an employer obligated to pay and secure compensation under the LHWCA. 20 C.F.R. 701.301(a)(13). However, as

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[4] The statutory provision that exempts NAFI employees from FECA coverage specifically provides that the exemption "does not affect the status of these nonappropriated fund activities as Federal instrumentalities." 5 U.S.C. 2105(c).

[5] Petitioner attempts to distinguish *United States* v. *Forfari*, *supra*, on the ground that *Forfari* involved a suit by a NAFI employee against the United States under the Federal Tort Claims Act, an action specifically precluded by statute (Pet. 7-8). However, *Forfari* was decided prior to the passage of 5 U.S.C. 8173, which now bars suits by NAFI employees against the United States. In reasoning directly applicable to this case, the *Forfari* court concluded that NAFI employees are still employees of the United States, notwithstanding that they are exempt from FECA coverage and their workers' compensation benefits are paid by the NAFI, not the United States. 268 F.2d at 31-33.

the court of appeals noted (Pet. App. 15), these Department of Labor regulations are directed to the internal administration of the LHWCA—for instance, claims procedures, administrative adjudication of contested claims, medical procedures, and insurance authorization procedures. The regulations do not purport to be and are not an authoritative definition of the term "employer" for the purpose of construing the statutory language "persons in the same employ" (Pet. App. 15).

c. Petitioner's contention that it is "unreasonable" to preclude her from suing respondent Earl when he is "nowhere precluded" from suing her (Pet. 8) is without merit. Traditional doctrines of intra-service immunity have been held to preclude an injured serviceman from suing a civilian Exchange Service employee. See *Hass* v. *United States*, 518 F.2d 1138, 1142-1143 (4th Cir. 1975).

In sum, this case presents a narrow issue of statutory construction, which was correctly resolved by the court of appeals.[6] As petitioner concedes (Pet. 7), the "issue is one of first impression" and thus the decision below does not conflict with the decision of any other court. Accordingly, further review is not warranted.

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[6] Although the scope of the *Feres* doctrine undoubtedly is important to military personnel (Pet. 10), that issue does not arise in this case. Petitioner's suit is clearly precluded by statute, 33 U.S.C. 933(i). Whether such an action is also inconsistent with the policies underlying the *Feres* doctrine is not presented. See Pet. App. 12 n.2.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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